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8 **UNITED STATES DISTRICT COURT**  
9 **WESTERN DISTRICT OF WASHINGTON**

10 DANIEL BLANCHARD, by his parents,  
11 CHERYL BLANCHARD and JERRY  
12 BLANCHARD; CHERYL BLANCHARD  
and JERRY BLANCHARD,  
Plaintiffs,

13 v.

14 MORTON SCHOOL DISTRICT; JOHN  
15 FLAHERTY; JOSH BROOKS; DAVE  
16 CRAYK,  
Defendants.

**Case No. C06-5166JKA**

**ORDER GRANTING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

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18 This matter comes before the court on Defendant's Motion for Summary Judgment. The  
19 court has reviewed and considered all materials submitted in support of and in response to said  
20 motion, as well as the files and records herein. Specifically, and over the objection of the  
21 defendant, the court has considered all materials submitted in response to the motion for  
summary judgment.

22 Following remand from the Ninth Circuit, three claims are scheduled for trial in this  
23 matter. They are: (a) review of the IDEA Administrative Decision; (b) claim under Section 504  
24 of the Rehabilitation act; and (c) claim under Title II of the Americans with Disabilities Act.

25 Defendants first raise the issue of party(ies) plaintiff. The plaintiffs appear pro se, staging  
26 Daniel Blanchard, a minor, to be without legal representation. This is contrary to *Johns v. County*  
27 *of San Diego*, 114 F.3d 876, and ordinarily would be a matter of primary concern to the court.

1 Plaintiff suggests that appointment of counsel for Daniel would be appropriate. A review of the  
2 record, however substantiates defendants' position that the bases for recovery by plaintiff Cheryl  
3 Blanchard are identical to those of her son, Daniel, and that the appointment of counsel is not  
4 necessary.

5 The court has reviewed carefully the Statement of Uncontested Facts as posed by  
6 defendants on pages 2-3 of their motion. To the extent that plaintiff attempts to supplement the  
7 "uncontested facts" for purposes of this motion, the proposed additions are in the nature of  
8 argument or legal conclusions and not "facts." For purposes of this motion, the court accepts the  
9 defendants' proposed Statement of Uncontested Facts.

10 This is a sad case of parental advocacy to assert rights on behalf of their son Daniel who  
11 suffers from autism and other severe limitations. Plaintiffs' claims arise out of the Morton School  
12 District's selection of Ella Allen as an educational assistant to work with plaintiff Daniel  
13 Blanchard. The claims were dismissed by an Administrative Law Judge following a due process  
14 hearing under the Individuals with Disabilities Education Act (IDEA). This action followed.  
15 Plaintiffs' claims were dismissed by the Honorable Franklin D. Burgess on defendants' motion  
16 pursuant to FRCP 12(b)(6). On appeal to the Ninth Circuit the matter was affirmed in part and  
17 reversed in part. The appellate court ruled that the plaintiff's claim to review the IDEA hearing  
18 was not time-barred, and that plaintiff Cheryl Blanchard could pursue relief under Section 504 of  
19 the Rehabilitation Act, 29 U.S.C. 794(a), and Title II of the Americans with Disabilities Act, 29  
20 U.S.C. 12132, insofar as she asserts and seeks to enforce the rights of her son and incurring  
21 expenses for his benefit.

22 In reviewing the IDEA decision the court first recognizes that the burden of proof is on  
23 the party challenging the decision, in this case the plaintiff. The issue before this court is whether  
24 or not the administrative record supports the Administrative Law Judge's determination that the  
25 IDEA was complied with, and that Daniel's educational needs have been appropriately addressed.  
26 See *Capistrano Unified School Distr. V. Wartenberg*, 59 F.3d 884 (9<sup>th</sup> Circuit 1995).

27 A review of the record substantiates that plaintiff's conspiracy allegations notwithstanding,  
28 the person plaintiff Cheryl Blanchard (Daniel's mother) hoped to have selected to be her son's  
educational assistant, Beth Byrd, would not have taken the job if offered it, and knew that if she  
applied for the job it would be given to her. There is no independent or objective evidence that

1 Ella Allen was an inadequate choice. Daniel was removed from the program by his parent after  
2 only 22 days of services provided by Ella Allen. All observing educators found the working  
3 relationship between Allen and Daniel satisfactory. The decision by the Administrative Law Judge  
4 easily meets the standard set forth in *Board of Education of Handpick Hudson Central School*  
5 *District, Westchester County V. Rowley*, 458 U.S. 176(1982) or the more recent standard set  
6 forth in *J.L. V. Mercer Island School District*, 2006 WL 3628033 (W.D. Wash. Dec. 8, 2006).  
7 There is no showing by a preponderance of the evidence that Daniel was denied a Free  
8 Appropriate Public Education given the challenges posed by his autism and related difficulties.

9 Both the Americans with Disabilities Act and the Rehabilitation Act require a showing of  
10 deliberate indifference. In order to meet that burden plaintiff must establish that (1) the  
11 defendants had knowledge from which an inference could be drawn that a harm to a federally  
12 protected right is substantially likely, and (2) the defendant actually draws that inference and fails  
13 to act upon the likelihood. *Duvall v. County of Kitsap*, 260 F.3d 1124 (9<sup>th</sup> Cir. 2001); *Toguchi v.*  
14 *Chung*, 391 F.3d 1051 (9<sup>th</sup> Cir. 2004). There is no evidence before the court that remotely  
15 reaches the level of deliberate indifference. Although negligence would be insufficient for  
16 recovery under either of these acts, the court finds no facts or inferences therefrom that would  
17 reach even that level of misconduct.

18 Defendants' Motion for Summary Judgement is hereby Granted.

19 Dated this 19th day of February 2008.

20 /s/ J. Kelley Arnold  
21 J. Kelley Arnold  
22 U.S. Magistrate Judge  
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